---

**U.S. Department of Labor**
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE ISSUED: April 15, 1993
CASE No.: 93-ERA-5

In the Matter of

WILLIAM DAVID SIMMONS
Complainant,

v.

ARIZONA PUBLIC SERVICE CO./
ARIZONA NUCLEAR POWER PROJECT
Respondent,

WILLIAM DAVID SIMMONS
Pro Se

REBECCA WINTERSCHEIDT
For the Respondent

Before: AARON SILVERMAN
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

Proceeding under the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851, and implementing regulations at 29 C.F.R. Part 24 (1990).

The Act prohibits covered employers from discriminating against any employee with respect to terms, conditions, or privileges of employment because the employee assisted or is about to assist in any action to carry out the purposes of the Act or the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011. These protected activities are popularly referred to as "whistleblowing."

In a complaint filed October 21, 1992, the Complainant, William David Simmons, alleged that Respondent, Arizona Public

---

[Page 2]

Service Co. (APS) discriminated against him by reason of eight actions taken against him between January 1990 and October 7, 1992, while employed at its nuclear power project in Palo Verde, Arizona.

He contends that the alleged actions were unbroken and continuing in retaliation for having sought advice from the Nuclear Regulatory Commission (NRC) concerning disparate application of working rules regarding the use of protective respirators.

Respondent contends that the actions taken did not have a retaliatory motive, that there is no basis for the allegations, and that, with the exception of one charge, Complainant failed to file his complaint in time.

## ISSUES

I. Is the complaint time-barred?

II. Did Respondent's actions constitute violations of Section 210 of the Act?

## STATEMENT OF THE CASE

A hearing was held in this matter on February 22 and 23, 1993, in Phoenix, Arizona. At the conclusion of the presentation of Complainant's case, Respondent renewed its pre-hearing motion for summary decision and dismissal of all but the final allegation contained in the complaint for untimeliness. The motion had been denied January 14, 1993. (Order Denying Respondent's Motion for Partial Summary Decision - SDO.) The SDO held that summary decision could not be granted until the parties had developed the evidence sufficiently to enable a determination pursuant to the Secretary of Labor's criteria set forth in *McCuiston v. T.V.A.*, 89-ERA-6, Sec'y Dec., Nov. 13, 1991. Upon renewal, the motion was granted because it was clear that Complainant had failed to establish that the allegations contained in the complaint were part of a pattern and practice of discrimination in retaliation for his alleged protected activity.

Complainant began working for Respondent in 1982. Prior to a facially disfiguring automobile accident in November 1986, he was a lead radiation waste operator at the Palo Verde nuclear

---

[Page 3]

generating station. (T-307).[1] As a result of his injury, he was off-work for approximately one month. Owing to his injury, he is unable to shave. At all times, pre- and post-injury, Respondent had a policy requiring all operators in the protected areas to be clean-shaven and ready to don a respirator device in case of emergency. (RX-1).

Complainant returned to work in a clerical capacity in January 1987. (T-310, 315). In October, Respondent granted a limited exception to the respirator policy, thereby, allowing Complainant to work as an evaluator in a protected area. (T-311, 315, RX-2). Thereafter, in August 1988, Complainant, believing the policy was in violation of NRC requirements, reported such to the Commission. (T-22-3, 319). In October 1989, he filed complaints with the Department of Labor (DOL) Wage and Hour Division (pursuant to Section 210 of the Act and the Safe Drinking Water Act, 42 U.S.C. §300 *et seq*) and Office of Federal Contract Compliance Programs (OFCCP) pursuant to the Federal Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq*. All complaints and issues arising therefrom were settled by agreements entered January 5, 1990. (CX-7, 8).

## FINDINGS AND CONCLUSIONS

### I. Timeliness

As was set forth in the SDO, and is clear in *McCuiston*, to be entitled to an equitable exception to the thirty-day limitations period under the continuing violation theory, Complainant must prove that every act of discrimination and retaliation is part of an overall employment practice manifested over a period of time rather than a series of discrete acts. The employment discrimination must be part of a "dogged pattern", not mere "isolated and sporadic outbreaks...." *Bruno v. Western Electric Co.*, 829 F.2d 957, 961. (10th Cir. 1987) quoting *Shehadeh v. C & P Tel. Co.*, 595 F.2d 711, 725, n. 73 (D.C. Cir. 1978).

The standard which the Secretary of Labor relies on, and is appropriate to this case, was spelled out in the SDO. The evidence needs to show that:

1) the acts involve the same type of

---

[Page 4]

discrimination;
they were recurring; and
they had such a degree of permanence that a reasonably prudent employee under the same circumstances would have become aware of the duty to assert his rights or would have realized that the adverse consequences of the act would continue to affect the employee.
*McQuiston*, 89-ERA-6, slip op. at 15-17; *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983), *cert. denied* 479 U.S. 868 (1986).

An analysis of the facts under this test determines whether the acts are "related closely enough to constitute a continuing violation... (or) are merely discrete, isolated, and completed acts which must be regarded as individual violations." *Berry* 715 F.2d at 981.

Another factor which is also considered is whether "it would have been unreasonable to require the plaintiff to sue separately on each (alleged discriminatory acts... because the plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory mistreatment." *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989).

The Complainant specifically alleged in his complaint of October 21, 1992[2] that he was discriminated against in violation of the Act on the following occasions:

1) After January 5, 1990,[3] and before August 1990, APS supervisor Randall Eimar told employees Linda Mitchell and Sarah Thomas that he would fire Complainant if given the opportunity;

2) On or about August 1990, Complainant was transferred from work control to the turbine building to operate the secondary chemistry system;

3) Complainant was kept isolated from other employees in his unit;

4) On or about August 1990, Complainant applied for supervisory position in water processing, but was denied such

---



promotion in December;

5) From September to December 1991, Complainant was assigned to operate the demineralizer water system;

6) On or about November 1991, Complainant was erroneously accused of falsifying time cards;

7) Between January and February 1992, Complainant was reassigned to his unit, but was required to obtain qualification as an operator under standards applied to new employees;

8) On or about October 7, 1992, Complainant was told by assistant shift Supervisor Dennis King that he would no longer be allowed to operate the - secondary chemical transfer equipment because of OSHA regulations requiring a respirator.

Complainant contends that allegations one through seven are timely because they are "ongoing and continuing violations" of the Act. In support, he states that "Respondent has

engaged in a pretextural [sic] pattern and practice of unceasing violations of [the Act and other federal statutes]. Respondent's discriminatory treatment of the Complainant's terms and conditions of employment continues each day the Complainant is employed by the Respondent. The allegations... made... are ongoing and continuing from January 1990 to date. Each of the events... are **escalating milestone events**... [showing] retaliatory treatment...." (emphasis in orig.) (Compl. Resp. to Reply to Motion for Summary Judgment).

Applying *Berry* to this case, Complainant must prove a series of violations constituting an organized scheme or policy leading to the current timely violation in order to preserve the timeliness of the complaint.

As the court in *Berry* found, permanence is, perhaps, the most important of the three factors, and is afforded the most weight in deciding the timeliness issue.

Although Respondent's acts which occurred over a two-year period are charged as discriminatory, and, arguably, may be considered of the same type, related and recurring, the degree of permanence of each act - should have alerted Complainant to exercise his rights under the Act.

Even if each of the acts alleged by Complainant does not rise to the level of permanence contemplated by the case law, certainly, his transfer from the air-conditioned work control

---



area to the hot, un-airconditioned turbine building in August 1990; the denial of promotion to supervisor in water processing; and the unequal qualification requirement imposed on him in the beginning of 1992 were such overt acts with a great degree of permanence that he should have known the need to file a complaint, since he believed that these acts occurred in retaliation for pursuing protected activities under the Act and characterized each of the alleged acts as a "milestone event." Accordingly, he should have filed his complaint within the required time period of any one of those events.

Furthermore, Complainant was familiar with the provisions of the Act owing to his prior filing. Having been represented by counsel in his first § 210 case, he knew that the Act had very specific requirements, and filed his original complaint within a day or so of the time he believed he was treated unfairly in violation of the Act (T-332-3).

Moreover, he believed he was being treated unfairly because, prior to October 1992, he filed a complaint with OFCCP in January 1991 shortly after he was denied the promotion to supervisor. (T- 365-6). At the hearing, when Complainant was asked to explain why he did not file a § 210 complaint over that incident, he said he did not file under the Act, at that time, because of "[t]he monetary considerations, the time involved, [and) the expedited time frames...." He also stated that he thought filing under the Act was a

"hassle" (T-326-7) and, when deposed on January 7, 1993, said that since "[he] was already addressing [the promotion issue] under OFCCP at that point... it would just be another iron in the fire." (T-328). Complainant also testified that he knew that OFCCP had no jurisdiction to investigate any claims for retaliation against a whistleblower. (T-337).

For the above reasons, pursuant to *McQuiston* and *Malhotra*, it is found that Complainant should have filed a complaint on, at least, three occasions prior to the date he finally did. Complainant devoutly believed he was a victim of discrimination prior to the culmination of the events alleged, but chose to do nothing under the Act. Therefore, it is found that Complainant's first seven allegations are untimely and barred from adjudication on the merits.

---

[Page 7]

II. Merits of the Complaint

Complainant contends in his most recent and timely charge that, on October 7, 1992, he was told by his supervisor, Mr. King, that he would be denied the opportunity to perform chemical transfers due to a change in the respiratory requirement affecting workers in that section of the plant. Respondent admits, while attempting to obtain clarification of a new respirator requirement promulgated in the revised safety manual, Complainant was prohibited from participating in transferring chemicals for a period of seven to ten days. Complainant contends he was prevented from working in chemical transfer for closer to a month (T-432-3), but a memorandum from Mr. King to Complainant states that as of October 14, 1992, he was allowed to perform chemical transfers. Regardless, once clarification was obtained from the safety - department, the restriction was lifted and Complainant was allowed to transfer chemicals as previously.

To establish a prima facie case of discrimination under the Act a complainant must show: 1) that he engaged in protected activity which the respondent was aware of; 2) respondent took adverse action against him; and 3) that the evidence is sufficient to, at least, infer that the protected activity was the most likely motive for the adverse action. *Jain v. Sacramento Mun. Util. District*, 90-ERA-1, Sec'y Dec., slip op. at 2, Apr. 2, 1992; *Dartey v. Zack Co. of Chicago*, 82-ERA-2, Sec'y Dec., slip op. at 7-8, Apr. 25, 1983.

Complainant has failed to prove that Respondent took some adverse action against him. He was prevented from working in an area of the plant for only a very short period of time, and suffered no monetary (T-432-3) or significant harm from this action. Furthermore, the evidence shows that Respondent prohibited Complainant from that area on the basis of a long- standing, company-wide policy which was not shown to have been singularly applied to the Complainant.

**RECOMMENDED ORDER**

For the foregoing reasons, it is recommended that the Secretary of Labor DISMISS this cause of action.

AARON SILVERMAN
Administrative Law Judge

Washington, D.C.

**[ENDNOTES]**

[1] The following abbreviations are used: T = hearing transcript; CX = Complainant's exhibits; and Rx = Respondent's exhibits.

[2] These allegations were enumerated in the Amended Complaint.

[3] Date of settlement of the prior complaints. (CX-7, 8).